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No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state trial court's good faith error in denying a criminal defendant's peremptory challenge requires reversal of a subsequent conviction as a matter of federal law, when that error did not deprive the defendant of a fair trial by an impartial jury or otherwise violate any federally protected right.

2. Whether there is any error at all when the trial judge's *sua sponte McCollum* challenge resulted in a clearly correct finding on the ultimate issue of discrimination.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

Batson v. *Kentucky* established a three-step procedure to determine whether a peremptory strike had been exercised in a discriminatory manner. Its intent was to reduce suspicions that discrimination had infected the jury process. Adherence to *Batson*'s procedure is important, but this process was never intended to be so rigid that a simple misstep would overturn a valid conviction. However, such reversals will occur under the precedent set by the Illinois Supreme Court in this case unless the error is corrected. That precedent would limit the ability of a trial judge to protect jurors from courtroom discrimination. Both results are contrary to the interests of the rights of society and victims which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Michael Rivera was the "chief enforcer" of the "Insane Deuces" street gang in Chicago. *People* v. *Rivera*, 348 Ill. App. 3d 168, 170, 810 N. E. 2d 129, 131 (2004). On the morning of January 10, 1998, Rivera saw Marcus Lee, a young African-American male, walking along the street and mistakenly believed him to be a member of a rival gang. Brief for Respondent 1. Rivera shot Marcus in the back of the head and bragged about it afterward. *Ibid*. Rivera was convicted of two counts of first-degree murder and was sentenced to 85 years in prison. *People* v. *Rivera*, 221 Ill. 2d 481, 483, 852 N. E. 2d 771, 773 (2006) ("Rivera II").

In his appeals, Rivera has never contested the sufficiency of the evidence supporting his conviction. *People* v. *Rivera*, 348 Ill. App. 3d, at 170, 810 N. E. 2d, at 131. Instead, Rivera has challenged the trial judge's decision to deny him the use of a peremptory strike. *Ibid*. He also raised an *Apprendi* issue that is not

before this Court. See *id*., at 179, 810 N. E. 2d, at 138; *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000).

During jury selection, Rivera sought to use his fourth peremptory strike to remove Mrs. Deloris Gomez from the jury. J. A. 147. Mrs. Gomez was a business officer in the outpatient orthopedic clinic at Cook County Hospital. *Ibid*. Defense counsel questioned Mrs. Gomez about her work at the clinic in order to determine whether her limited exposure to gunshot victims might affect her ability to act as a fair juror in Rivera's case. *Ibid*. Mrs. Gomez stated it would not, yet defense counsel sought to strike Mrs. Gomez from the jury. *Ibid*.

The trial judge promptly held a conference in chambers so that defense counsel could explain his reasons for the strike. *Ibid*. The trial judge believed duty required him to raise the question *sua sponte* because defense counsel was discriminating against Mrs. Gomez. *Ibid*. The trial judge did not find defense counsel's explanation credible, overruled the strike, and seated Mrs. Gomez on the panel. J. A. 148-149.

While still in chambers, defense counsel requested leave to conduct additional questioning of Mrs. Gomez. J. A. 149. Throughout the questioning, Mrs. Gomez maintained that her work would not affect her judgment. She also noted that the outpatient clinic where she works is not in the same location as the emergency room where gunshot victims would receive their initial treatment. J. A. 36-38. Defense counsel was not satisfied by her responses. He still wished to strike Mrs. Gomez. J. A. 39. In chambers and on the record, defense counsel further explained his reasons for the strike. *Ibid.* He claimed he was "trying to get some impact from possibly other men in the case." *Ibid*. He was "trying to modify the composition of this panel. I'm not trying to exclude a woman because of her race, but

strike that[,] not trying to excuse a juror because of her race." *Ibid*.

On appeal, Rivera argued that the trial court had erred when it raised a reverse-*Batson* challenge *sua sponte*. *Rivera*, 348 Ill. App. 3d, at 169, 810 N. E. 2d, at 131. The Illinois Appellate Court rejected his argument and affirmed Rivera's conviction and sentence. *Id*., at 177, 810 N. E. 2d, at 138. The Illinois Supreme Court reviewed the case and remanded it "for a limited hearing to allow the trial judge an opportunity to articulate the bases for his *Batson* rulings." *Rivera II*, 221 Ill. 2d, at 515-516, 852 N. E. 2d, at 791-792. In November 2006, six years after defendant's trial, the now-retired trial judge testified that he believed the defense was engaging in gender discrimination. J. A. 136. To lead into his discussion of gender discrimination, the trial judge made statements reflecting his additional concern of racial discrimination. J. A. 135. He stated that the murder victim "was an African-American male," his mother "was also African-American," and Mrs. Gomez was "another female African-American"—the second the defense had sought to excuse. *Ibid.*

In its final review of Rivera's claim, the Illinois Supreme Court examined the entire record, including the trial judge's testimony, and found it insufficient "to support a prima facie case of discrimination *of any kind*." J. A. 157. Its conclusion was based on state precedent that "the mere number of persons in a protected class who are peremptorily challenged, without more, will not establish a prima facie case of discrimination." J. A. 156. The court found it was the challenger's burden to provide more information on the characteristics of the venire, the characteristics of the others struck, and the answers of those not struck, before it could conclude a prima facie case had been

made. *Ibid*. Since the State and the trial court had failed to provide more information, the Illinois Supreme Court concluded the record did not support the action of the trial court. *Ibid*. The court concluded Mrs. Gomez should not have been seated on the jury. J. A. 157-158.

The court then went on to examine whether reversal was required, or if the error was harmless. J. A. 158. The court concluded that the harmless error test could be applied to denial of a peremptory challenge. See J. A. 166. The court assessed the harm caused by placing Mrs. Gomez on the jury by applying the reasonable juror standard. *Ibid*. If the evidence was so overwhelming that no rational juror would have acquitted Rivera, then Mrs. Gomez's presence on the jury was harmless. *Ibid.* Concluding that the evidence was so overwhelming that "any rational trier of fact would have found the defendant guilty of murder . . . ," J. A. 171, the court found denying Rivera's peremptory challenge had been harmless error. It then affirmed the judgment of the Illinois Appellate Court. J. A. 176.

This Court granted certiorari on October 1, 2008.

SUMMARY OF ARGUMENT

Rivera asks this Court to determine whether harmless error analysis should have been applied to the trial court's *Batson* challenge. The question assumes the Illinois Supreme Court correctly found error. This assumption is incorrect. As Respondent and *amicus* have stated, there was no error in Rivera's case. Resolution of whether the state court's finding of error was correct is a "necessary predicate" to the harmless error question under *Caspari* v. *Bohlen*.

When a defendant challenges the trial court's decision to overrule his use of a peremptory strike, the reviewing court's inquiry is fairly limited. The three preliminary steps laid out in *Batson* allow the trial court to establish an orderly record for review. Once the record reaches an appellate court, all that is left to decide is whether with the trial court's finding of discrimination is fairly supported. In appellate practice, the importance of the *Batson*'s first preliminary step has been clearly articulated in *Hernandez* v. *New York*. *Hernandez* established that once a trial court has ruled on the ultimate issue of discrimination, any preliminary issues concerning the prima facie case are moot. Simply put, a trial judge's finding of discrimination after full inquiry removed the need to go back and look at why discrimination was suspected.

Batson adopted its three-step procedure from cases discussing employment discrimination under Title VII of the Civil Rights Act of 1964. It is to those cases that courts should look for guidance. In Title VII cases, this Court has adopted the rule that a finding of discrimination renders review of the prima facie case irrelevant, and the Courts of Appeals have applied this rule uniformly to both plaintiff-appellants and defendant-appellants. The same universal adoption has not occurred for *Batson* challenges. In *Batson* cases, some lower courts, including the Illinois Supreme Court, have concluded that after a discrimination claim has been tried on the merits, appellate courts have the authority to re-examine the prima facie case. Such action contradicts *Batson*'s origins and is contrary to the policy expressed in *Johnson* v. *California*.

Furthermore, even if the Illinois Supreme Court correctly re-examined the trial court's prima facie case, it incorrectly found there was no evidence of discrimination. The record shows that Rivera was on trial for

the murder of an African-American man, and that out of four peremptory strikes, three were used against women, two of whom were African-American women. This provided sufficient justification for the trial court to inquire into defense's motives for the strikes. Upon inquiry, defense counsel admitted he was striking an African-American woman so he might place more men on the jury. His express admission confirms the trial judge's decision to inquire into his motives. Without the judge's inquiry, discrimination would not have been uncovered, and *Batson*'s intention of eliminating discrimination from the trial process would not have been served.

ARGUMENT

I. Whether there was any error cognizable on appeal is an issue fairly included in the question presented.

The question as framed by petitioner assumes that the trial court committed error when it denied defense counsel's peremptory strike. Respondent State of Illinois has consistently maintained, in the state courts and in its Brief in Opposition in this Court, that there was no error.

This question is a "subsidiary question fairly included in the question presented." *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994); Supreme Court Rule 14.1(a). It is " 'predicate to an intelligent resolution' of the question presented," *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted), because the question of whether an error was harmless makes no sense if there was no error. Just as the appellate court found no error because "the trial court could rationally find a motive to discriminate against African-Ameri-

cans, women, or both groups simultaneously," *People* v. *Rivera*, 348 Ill. App. 3d 168, 179, 810 N. E. 2d 129, 138 (2004), and did not address the harmless error issue, this Court may resolve this case on the grounds that a correct finding of discrimination in a defense peremptory challenge precludes reversal based on second-guessing a preliminary step.

Jones v. *United States*, 527 U. S. 373 (1999), is on point. The Court granted certiorari on the question of "[w]hether . . . the submission of invalid nonstatutory aggravating factors was harmless" in a capital case. See *Jones* v. *United States*, 525 U. S. 809 (1998). The plurality opinion held that the question of whether the factors were invalid was fairly included. See 527 U. S., at 396-397.

Moreover, this question is properly before this Court because a "prevailing party, without cross-petitioning, is 'entitled under our precedents to urge any grounds which would lend support to the judgment below.' " *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994). This includes an argument rejected by the court below, so long as the argument would support the judgment. See *id*., at 78-79. Illinois has consistently maintained that the trial judge did not err. The State argued it in the courts below, the argument was accepted in the Illinois Appellate Court, *People* v. *Rivera*, 348 Ill. App. 3d, at 179, 810 N. E. 2d, at 138, and it has been preserved in the Brief in Opposition. See Brief in Opposition 26-29. The point is also made in the merits brief, albeit fleetingly. See Brief for Respondent 43, and n. 3.

The relevance of the mootness language in *Hernandez* v. *New York*, 500 U. S. 352 (1991), to reverse-*Batson* challenges has been litigated throughout Rivera's appeals. Fairly included in the question presented is whether *Hernandez*'s adoption of the Title VII line of

cases is applicable here. Addressing the threshold question of whether the issue of a prima facie case becomes moot after the trial judge has found discrimination is necessary to full resolution of this case.

II. On appeal, after a *Batson* or *McCollum* issue has been heard through all three stages, only the final finding of discrimination should be reviewed.

From the beginning, the three-step procedure laid out in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), has been equivalent to the procedure used in employment discrimination cases.

> "We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that '[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.' *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983). The same principle applies under *Batson*. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez* v. *New York*, 500 U. S. 352, 359 (1991) (plurality opinion).

The Illinois Supreme Court erred when it believed the *Hernandez* reasoning did not apply to "reverse-*Batson*" challenges under *Georgia* v. *McCollum*, 505 U. S. 42 (1992). See *Rivera II*, 221 Ill. 2d, at 507, 852 N. E. 2d, at 786-787.

A. Origins of the Prima Facie Requirement.

The three-step procedure adopted in *Batson* did not originate in criminal cases. Instead, the *Batson* Court expressly adopted the "prima facie burden of proof rules" from a trio of employment cases. 476 U. S., at 94, n. 18. These rules place the ultimate burden of persuasion on the party claiming to be the victim of intentional discrimination, *ibid*., so once the court has ruled that the party has, or has not, met his burden, the inquiry into discrimination has reached its logical end. At all times throughout the process, the "ultimate issue is whether the State has discriminated," *id*., at 95, and *Batson*'s methods explaining how a defendant "may make out a prima facie case," *id*., at 96, n. 19, should not distract from the importance of deciding the ultimate issue. The three-step method "was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.' " *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983) (quoting *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978)).

Batson's adoption of a three-step procedure was not meant to guarantee jury impartiality; it was adopted to review claims of racial discrimination. The claimant's burden to establish a prima facie case of discrimination in the first step of *Batson* review is not, therefore, part of a constitutional right to impartiality. This requirement is supposed to be one step in a method designed to review discriminatory conduct. Once a court rules on the ultimate issue of discrimination, it is not strict adherence to the methods endorsed by *Batson* that is important. The final determination carries the ultimate weight.

Nowhere is this clearer than the issue this Court chose to examine in *Batson*. The *Batson* case "concern-[ed] the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Batson*, 476 U. S., at 82. To examine the defendant's evidentiary burden, and establish a framework for the parties to follow, the Supreme Court turned to cases that addressed discrimination in other contexts, such as employment and selection of the venire. The latter helped establish the context for the *Batson* decision; the former provided the framework that is at issue today.

B. The Employment Cases.

McDonnell Douglas Corp. v. *Green*, 411 U. S. 792 (1973), is the first decision *Batson* cites to "explain[] the operation of prima facie burden of proof rules." *Batson,* 476 U. S., at 94, n. 18. *McDonnell Douglas* was an early ruling discussing the burdens, order, and nature of proof in proving a Title VII claim. *Batson*'s matter-of-fact adoption of the *McDonnell Douglas* framework from the employment cases without extended discussion negates the notion that the three-step procedure was based on any considerations unique to peremptory challenges.

In his Title VII claim, Green had filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) alleging that McDonnell Douglas's hiring practices violated provisions of the Civil Rights Act of 1964. *McDonnell*, 411 U. S., at 796. The EEOC made no finding on whether McDonnell Douglas had engaged in a discriminatory hiring process, but did find that McDonnell Douglas had improperly failed to rehire Green because of some of his civil rights activities. *Id*., at 797. The EEOC finding permitted Green to file suit

in federal court. *Ibid*. The District Court then dismissed Green's claim of racial discrimination in the hiring procedures because the EEOC had failed to make a determination of reasonable cause on this claim. *Ibid.* The Court of Appeals reversed, finding that an EEOC determination was not a jurisdictional prerequisite to raising a Title VII claim in federal court. The case was remanded for trial with standards regarding burdens of proof. *Id*., at 798. The Court of Appeals standards noted that Green had established a prima facie case of racial discrimination, that McDonnell Douglas's explanation was "subjective" and "carried little weight in rebutting charges of discrimination," but that Green should be given the opportunity to demonstrate that McDonnell Douglas's refusal to rehire him was based on mere pretext. *Ibid.*

This Court affirmed the Court of Appeals finding of federal jurisdiction and remanded the case for trial on Green's claim of racial discrimination, but it did so with its own instructions. *Id*., at 798-800. According to this Court, the Court of Appeals had attempted, through two unsuccessful and incompatible opinions, "to state applicable rules as to the burden of proof and how this shifts upon the making of a prima facie case." *Id*., at 801 (footnote omitted). To remedy the problem, the Supreme Court established the three-part procedure that is at issue in the present case. *Id*., at 802-804. From *McDonnell Douglas* forward, a complainant is charged with the burden of establishing a prima facie case of discrimination. *Id*., at 802. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid*. McDonnell Douglas's reason was found sufficient "to meet the prima facie case," but it was insufficient to end the inquiry. *Id*., at 804. An ultimate decision on discrimination could not be found until Green had been afforded the opportunity to prove

the explanation was a pretext. *Ibid*. Only then could the District Court "order a prompt and appropriate remedy." *Id*., at 807.

The burden-shifting procedure originally adopted for Title VII cases became a part of the criminal trial process 13 years later. See *Batson*, 476 U. S., at 94, n. 18. Now, when an appellate court finds itself questioning the trial court's application of the burden-shifting structure, the appellate court should be informed by *McDonnell Douglas* and its progeny as well as *Batson* and its progeny. *Batson* informs us that the *McDonnell Douglas* procedure applies, but it does not give a court much insight on how an appellate court reviews the process. In a case like the present one, where the defendant is claiming the trial court's *sua sponte* action was incompatible with the *Batson* framework, J. A. 145, there is no clear *Batson* answer. We can therefore turn to the Title VII cases for guidance.

Between *McDonnell Douglas* and *Batson*, this Court addressed the effect that the prima facie case step has on appeal after the trial court had made the ultimate finding of discrimination. The answer is, in effect, "not much." See *Aikens*, 460 U. S., at 714-715.

Aikens had filed a Title VII claim against the U. S. Postal Service, claiming racial discrimination. *Id*., at 712. The trial court had found in favor of the Postal Service, but the Court of Appeals reversed. *Id.,* at 713. On remand from the Supreme Court, the Court of Appeals reaffirmed its earlier holding. It found error because the District Court had required Aikens to offer direct proof of discriminatory intent and required Aikens to prove "as part of his prima facie case, that he was 'as qualified or more qualified' than the people who were promoted." *Ibid*.

When arguing their case before this Court, both parties framed the issue in terms of whether Aikens had adequately established a prima facie case of discrimination. The Postal Service claimed Aikens had not, and Aikens claimed he had. See *ibid*. The Court found such arguments "surprising," because when a case has been "fully tried on the merits" framing the issue in terms of the prima facie case "unnecessarily evaded the ultimate question of discrimination *vel non*." *Id*., at 713-714. *Aikens* implies that failure to make a prima facie case would be a ground for dismissal of the case at an early stage. See *id*., at 714, n. 4, see also *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 509 (1993).

> "But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption 'drops from the case,' 450 U. S., at 255, n. 10, and 'the factual inquiry proceeds to a new level of specificity.' " *Aikens*, *supra*, at 714-715 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 255 (1981)) (footnote omitted).

A narrow reading of *Aikens* might limit it to cases where the defendant (*i.e.*, the party accused of discrimination) prevailed in the trial court, leaving the adequacy of plaintiff's prima facie case open to review where the defendant is the appellant. The Courts of Appeals have not understood the *Aikens* rule to be so limited. In *Mitchell* v. *Baldrige*, 759 F. 2d 80, 83 (CADC 1985), the court stated the *Aikens* rule as generally making the prima facie case irrelevant on

appeal for all cases fully tried on the merits. The prima facie case was reviewed on appeal in *Mitchell* because, and only because, the case had been dismissed prematurely, based on a misunderstanding of the prima facie case requirements. See *id*., at 84.

In *Cumpiano* v. *Banco Santander Puerto Rico*, 902 F. 2d 148, 151 (CA1 1990), the plaintiff had prevailed after a full trial, and the employer appealed, claiming deficiencies in the prima facie case. See *id*., at 154-155. The court rejected that argument on the merits, see *ibid*., but also "remark[ed] the essential pointlessness of [such] arguments." *Id*., at 155. The principle that proof of discrimination is the critical determination "requires the trial court at case's end, as well as a reviewing court, to focus not on the artificial striations of the burden-shifting framework, but on 'the district court's ultimate finding of discrimination *vel non*.' " *Ibid*. (quoting *Jackson* v. *Harvard University*, 900 F. 2d 464, 466 (CA1 1990)). Similarly, in *Hopp* v. *City of Pittsburgh*, 194 F. 3d 434, 436 (CA3 1999), the plaintiffs prevailed at trial, and the city appealed, claiming that a heightened standard for the prima facie case should have been required under the circumstances. See *id*., at 438. The Third Circuit held that this argument was foreclosed by *Aikens*, " 'and the question whether the plaintiff made out a prima facie case is no longer relevant.' " *Id*., at 439 (quoting *Tidwell* v. *Carter Products*, 135 F. 3d 1422, 1426, n. 1 (CA11 1998)). In *Boehms* v. *Crowell*, 139 F. 3d 452, 457-458 (CA5 1998), another case of an employer-appellant attacking the employee-plaintiff's prima facie case, the Fifth Circuit held,

> "Because the ebb and flow of burden-shifting is intended to apply at the *interim* stages of the proceeding—*i.e.*, when a party's rights are affected by a record containing less than full proof [cita-

> tion]—a reviewing court need not examine the adequacy of the showing at any stage of the burden-shifting framework after a case has been fully tried on the merits." See also *Imwalle* v. *Reliance Med. Prods.*, 515 F. 3d 531, 545-546 (CA6 2008) (plaintiff's failure to prove element of prima facie case not dispositive after jury trial on the merits).

In other words, the "threshold question of a *prima facie* case of discrimination," which the Illinois Supreme Court made the crux of its rulings in this case, see J. A. 145-146, was never intended to be of particular importance after the trial judge had made the ultimate discrimination ruling. See *Aikens*, 460 U. S., at 715. Once the final determination has been made after a full hearing, there is no point in revisiting a preliminary step intended only to screen out insubstantial cases. That would be like reversing a conviction entered after a full, fair trial on the ground that the evidence at the preliminary hearing was insufficient to bind the defendant over. Most states do not allow an appeal on that ground. See 4 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 14.3(d), pp. 339-340 (3d ed. 2007).

C. Application to Batson.

In its first opinion in the present case, holding that the issue of a prima facie was not rendered moot by a decision on the merits, the Illinois Supreme Court appeared to be oblivious to the roots of the three-step procedure in the employment cases and rendered its decision without any reference to the guidance available in those cases. See *People* v. *Rivera*, 221 Ill. 2d 481, 505-509, 852 N. E. 2d 771, 785-788 (2006). This is particularly surprising given that the court was well aware of *Hernandez* v. *New York*, 500 U. S. 352, 359 (1991) (plurality opinion), which unambiguously cites

Aikens and says *Batson* challenges are governed by the same principle.

In *Hernandez*, the prosecutor offered race-neutral explanations for his strike after Hernandez had raised his *Batson* challenge, but before the defense had made a prima facie case of discrimination. *Id*., at 356-357. The trial judge allowed the strike and was affirmed by the Appellate Division and the New York Court of Appeals. *Id*., at 358. In its own affirmance, a plurality of this Court found no error even though the prosecutor had offered explanations without prompting. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Id*., at 359.

It is correct to note that the *Hernandez* case did come to this Court in an unusual procedural posture, as several lower circuit courts have found when they gave limited scope to *Hernandez*'s language. See *United States* v. *Stewart*, 65 F. 3d 918, 924 (CA11 1995). What remains critical, though, is that *Hernandez* recognizes the Title VII cases as authoritative in a *Batson* challenge.

Another critical element of the *Batson* line of cases is its underlying policy of encouraging judges to inquire into discrimination when the question is close. See *Johnson* v. *California*, 545 U. S. 162, 172-173 (2005). It would be nonsensical to urge trial judges to protect against the " 'harm from discriminatory jury selection . . . ,' " *id*., at 172 (quoting *Batson*, 476 U. S., at 87), by "asking a simple question" only to reverse the trial judge because his inferences guided him to do so. When something as ominous as racial discrimination rears its head to " 'undermine public confidence in the fairness of our system of justice,' " *ibid*. (quoting *Batson*, *supra*,

at 87), speculation by the trial judge is insufficient protection. See *ibid*. The Illinois Supreme Court's approach of close scrutiny of the prima facie case, lack of deference to the finding, and potential reversal despite a clearly correct finding of discrimination in the final step is contrary to the policy behind *Johnson*.

Without fully understanding the importance of reducing speculation in equal protection claims, some lower courts have limited *Hernandez*'s "moot" language to the specific context of that case. These decisions have read *Hernandez* more narrowly than is warranted. The mootness language was introduced by reference to the Title VII cases that established *Batson*'s three-part test. Keeping this context in mind points us to the correct conclusion.

The Eleventh Circuit's opinion in *United States* v. *Stewart*, 65 F. 3d 918, 924 (1995), is one of the better-reasoned opinions of this type, yet it still misses the mark. *Stewart* involved the conviction of three Ku Klux Klan members who had used three peremptory strikes to remove three of the four African-Americans on the jury. *Id*., at 922. In such circumstances it would be an understatement to claim discrimination could not be inferred. Ultimately, the Eleventh Circuit did uphold the convictions, recognizing that the appellate court should "give great deference to the district court's finding of a prima facie case." *Id*., at 923. Applying this standard, the Court of Appeals affirmed the finding. *Id*., at 926. However, it rejected the argument that an ultimate decision on discrimination made the prima facie case moot. *Id*., at 924.

Rejection of this argument is inconsistent with the purpose *Batson* was designed to achieve, and the Eleventh Circuit's opinion undercuts public policy goals by distinguishing *Hernandez* on superficial grounds. For the Eleventh Circuit, *Hernandez* was not applicable

because the *Hernandez* trial court had not found discrimination, *Hernandez*'s language was dictum and part of a plurality opinion, and the *Hernandez* prosecutor had offered race-neutral explanations without any prompting by the trial court. See *id*., at 924. *Hernandez*'s mootness language could not be used to overcome the prima facie case "hurdle" for the party making the *Batson* challenge because this Court had repeatedly described the prima facie case as an integral part of the *Batson* analysis. See *id*., at 925. The same criticism could be made of *Aikens*, which has effectively eliminated review of trial court findings that the plaintiff did make a prima facie case. The fact that a preliminary step is required does not mean it must be reviewable on appeal. In the extreme, and presumably rare, case that a trial judge is oblivious to the prima facie case requirement and demands explanations of peremptory challenges with no basis for suspicion, see, *e.g.*, *State* v. *Evans*, 100 Wash. App. 757, 760, 998 P. 2d 373, 376 (2000), a peremptory writ would be available and would not likely be needed more than once. In the normal course of events, the judge's respect for precedent and an institutional interest in moving the case along are sufficient to prevent excessive inquiries.

Taken in the proper context, using the *Batson* framework to end discrimination, it is counterproductive to reverse a final judgment because one of the preliminary steps was erroneous or insufficiently documented on the path to a correct result. Only in cases where the evidence available to the appellate court shows that a party was denied a valid challenge would reversal be warranted.

III. The type of discrimination established for a prima facie case need not be exactly the same type found in the final ruling.

The Illinois Supreme Court seemed to think that there was something amiss in the trial judge's suspicions of racial discrimination when the ultimate finding was of gender discrimination. J. A. 157. This important point requires clarification. The discrimination ultimately found in a *Batson* inquiry need not be the same as the type suspected at the prima facie case step.

A. Orderly Presentation of Evidence.

The three preliminary steps in *Batson* were adopted to preserve the orderly presentation of evidence when making a discrimination claim. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). *McDonnell Douglas* articulated a standard framework when two court of appeals decisions had been unable to establish a coherent framework. *Id.*, at 801. In articulating new steps, this Court found it necessary for a party to assert grounds for a claim, listen to the explanations of the other side, and then assert evidence to show the explanations were pretextual. *Id.*, at 802-807. These preliminary steps established a method to allow the judge to weigh all relevant evidence when he made his ruling. Regardless of the reasons beginning the inquiry, once discrimination is clearly evident, see, *e.g.*, J. A. 39, it must be remedied. *Batson* preserved this purpose when it adopted the prima facie framework and recognized that a defendant could "make out a prima facie case of purposeful discrimination by showing the totality of relevant facts [giving] rise to an inference of discriminatory purpose." *Batson* v. *Kentucky*, 476 U. S. 79, 93-94 (1986). It is not reversible *Batson* error if the trial judge finds relevant evidence of one discriminating

purpose after initially suspecting discrimination of some other sort.

B. Satisfaction of Purpose.

In this case, the purpose of the *Batson* framework has been satisfied. The *Rivera* trial court, in chambers, asked defense counsel for "a basis of why you are excusing Ms. Gomez" *sua sponte*. J. A. 34. Defense counsel gave Mrs. Gomez's exposure to gunshot victims as his race-neutral explanation. *Ibid*. The court expressed some skepticism, and asked to hear from the prosecutor, who also did not accept defense counsel's explanation. J. A. 34-35. At this point, the trial judge had sufficient evidence to make a determination on discrimination. He had witnessed both defense counsel's and the prospective juror's demeanor during the selection process (something that cannot be expressed in an appellate record), he had heard counsel's explanation for the strike, had articulated his belief of pretext, and had heard from the prosecutor. There is no evidence that either party was confused as to their roles in the *Batson* process. The goal of having "a sensible, orderly way to evaluate the evidence," *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978), was achieved.

It was not until defense counsel insisted upon further questioning and explanation that the true discriminatory reasons for the strike became apparent. J. A. 36-39. It was here that defense counsel stated he was trying to rebalance the jury so that he would "get some impact from possibly other men in the case." J. A. 39. The statement only gave the trial judge a clearly valid reason to overrule the strike. There is no "balancing" exception to the juror's right not to be discriminated against on the basis of race or gender. See *Rice* v. *Collins*, 546 U. S. 333, 340 (2006) (prosecutor's

"balancing" justification for striking female juror); *id*., at 336 (correctly rejected).

When both the purpose of the prima facie case and justice have been served, the type of discrimination ultimately found does not matter. A lawful look does not depend upon whether the seeker finds precisely what he set out for. This Court's search and seizure cases provide an analogy. In *Arizona* v. *Hicks*, 480 U. S. 321, 323 (1987), the officers entered Hicks' home to search for the individual who shot a bullet through the floor of Hicks' apartment into the apartment of the man below. *Ibid*. In light of the evidence available to them at the time, the police entered the apartment without a warrant, looking only for the shooter, more victims, and for weapons. *Ibid*. They found weapons and a stocking cap mask. *Ibid*. They also found stolen stereo equipment. *Ibid*. In the course of investigating one crime, the police officers found evidence of another. While this Court ultimately found that moving the stereo equipment exceeded the scope of "plain view," the mere observation of it did not. See *id*., at 324-325, 328-329.

Like the police officers in *Hicks*, the trial judge in the present case was investigating one type of discrimination when he was presented with clear evidence of another. The fact that the trial judge first believed Mrs. Gomez was being struck because she was African-American does not immunize defense counsel's admission that he was discriminating against her because she was a woman. J. A. 148-149. Neither race nor gender are permissible reasons for striking a juror, *Batson*, 476 U. S., at 90; *J. E. B.* v. *Alabama ex rel. T. B.,* 511 U. S. 127, 146 (1994), and where the evidence was presented in an ordered manner, there was no constitutional basis for an appellate court to reverse the judge's correct finding on the ultimate issue.

IV. The trial court properly found a prima facie case.

Batson v. *Kentucky*, 476 U. S. 79, 96 (1986), sets forth the elements of a prima facie case:

> "[F]irst [a party] must show that he is a member of a cognizable racial group, [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[2] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Before the trial court may go forward and request a neutral explanation, the trial court must consider all relevant circumstances.

Taking *Batson*'s steps one at a time, the trial judge's finding of a prima facie case, if reviewed at all, should have been affirmed. First, it was clear that Mrs. Gomez, a party protected from discrimination under *Batson*, was an African-American. J. A. 34. Also, it is clear that defense counsel had been exercising his peremptory strikes against women, J. A. 137, and Mrs.

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2. This element is no longer essential after *Powers* v. *Ohio*, 499 U. S. 400, 416 (1991), although racial identity of the defendant remains relevant to the third element.

Gomez was the second peremptory strike sought against an African-American woman. J. A. 35, 65, 75.

Second, the *Batson* rule explicitly recognizes that the peremptory challenge process "allows those to discriminate that are of a mind to discriminate." *Batson*, 476 U. S., at 96. This recognition was reinforced in *Georgia* v. *McCollum*, 505 U. S. 42, 53 (1992), when this Court observed, "Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State." See also *Johnson* v. *California*, 545 U. S. 162, 171-172 (2005). Such observations caution trial courts to suspect discrimination during *voir dire*, and this Court's cases have instructed that suspicion of discrimination must not be treated lightly. It was correct for the trial judge to heed such warnings, just as it was incorrect for the Illinois Supreme Court to so easily question them.

The final element of the prima facie case is a showing that the first two factors, plus "other relevant circumstances" are sufficient to raise an inference that the party was discriminating. *Batson*, 476 U. S., at 96. *Batson*'s circumstances can include a "pattern" of strikes against a class of jurors, or counsel's questions and statements during *voir dire*. *Id*., at 97. But these "illustrative" circumstances are not meant to trump the judgment of "trial judges, experienced in supervising *voir dire*." *Ibid*. The *Batson* Court's confidence in that experienced-based judgment implies that when it is proper to review the finding of a prima facie case, review should be deferential and not *de novo*. Compare *Tolbert* v. *Page*, 182 F. 3d 677 (CA9 1999) (en banc), with J. A. 152-154.

The circumstances surrounding Rivera's peremptory strikes are sufficient to uphold the trial judge's finding

of a prima facie case. That is, the circumstances justify his *sua sponte* decision to ask for explanation. First, Mrs. Gomez, the victim, and the victim's mother—an anticipated witness—were all African-American. J. A. 78. Second, defense counsel had already exercised three strikes and one had been to excuse an African-American. J. A. 35; Brief in Opposition 2. He had used two of the three strikes against women. Brief in Opposition 2. The number of African-Americans and women on the venire remains unclear, but, if defendant had been able to use his fourth strike against Mrs. Gomez, 50% of his exercised strikes would have been against African-Americans, and 75% would have been against women. At this point, the State had exercised only one peremptory strike.

Also relevant is Mrs. Gomez's responses during *voir dire*. She stated she believed she could be fair, she did not know any of the attorneys or Mr. Rivera, or any people who might be called as witnesses. J. A. 30. She did not have immediate family ties to law enforcement, she was not a crime victim, nor had she read anything about the case. *Ibid*. She also stated that her clerical job at Cook County Hospital would not have any effect on her as she viewed the evidence in Rivera's case. J. A. 32-33. In particular she stated for defense counsel that her "treatment of those in the out-patient clinic," would not "set [her] off one way or another against [Rivera]." J. A. 33. Following her statement of impartiality, defense counsel moved to excuse Mrs. Gomez.

At this point the trial judge had sufficient evidence to support a suspicion under *Batson*'s three-part test. The court had been watching the entire *voir dire* process and was free to infer that defense counsel was discriminating. Under the principle of *Johnson*, he was also free to ask questions about counsel's motives. In chambers, the trial judge stated, "I did this *sui spontae*

[sic] because I was concerned about the right of Mrs. Gomez to be a juror and participate. If the State in fact had done this, I certainly would have found they would have established a prima facie case by the very [same] reason . . . ." J. A. 35-36. As far as he was concerned, "it is more than a prima facie case of discrimination against Mrs. Gomez." J. A. 36.

The trial court's inference was not unwarranted. Later proceedings reveal further evidence which support a pattern of discriminatory defense practices. After the trial court seated Mrs. Gomez, the defense asked the court to strike a juror who had already been seated. J. A. 40-41. The juror, a white male, was seated next to a Hispanic woman sitting in the back row. J. A. 56. By striking the white male, the defense was able to question, and eventually seat, the Hispanic woman. *Ibid.* The action undermines his assertion that he wished to seat more men. J. A. 39. This action only adds to the case that, when combined with other circumstances, the defense did not want African-American women on his jury. Although these proceedings took place after the *Batson* challenge, it is one more fact in support of the trial judge's unarticulated inference that discrimination was taking place.

If *Batson* is truly meant "to produce actual answers to suspicions and inferences that discrimination may have infected the jury process[,]" *Johnson*, 545 U. S., at 172, then "the first step [cannot] be so onerous that a [party] would have to persuade the judge—on the basis of all the facts, some of which are impossible for the [party] to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Id.*, at 170. The same is true when the judge raises the issue *sua sponte*. If inference is really enough, then the facts of this case are sufficient to give rise to an inference.

Johnson's relatively low threshold was good law when the Illinois Supreme Court remanded the case to allow the trial judge to articulate his reasons for his challenge. The case did not need to be remanded. The trial judge had sufficient reason to inquire. Upon inquiry, his finding of discrimination was not clearly erroneous. Indeed, it is clearly correct. See *supra*, at 21. The intermediate appellate court in this case got it right the first time, five years ago. See *People* v. *Rivera*, 348 Ill. App. 3d 168, 178, 810 N. E. 2d 129, 137-138 (2004).

CONCLUSION

The judgment of the Illinois Supreme Court, to the extent it affirms the judgment of the appellate court and circuit court, should be affirmed.

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Respectfully submitted,

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